FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of:	)	
	)	
Reexamination of the Comparative	)	MM Docket No. 95-31
Standards for Noncommercial	)	
Educational Applicants	)	

To: The Commission

COMMENTS

Sound of Life, Inc., Connecticut College Broadcasting Association, Inc., Spirit of America, Inc., Faith Academy d/b/a WFEN and Christian Broadcasting, Inc. (hereinafter, the "Five Broadcasters"), pursuant to the Further Notice of Proposed Rule Making, FCC 98-269, released October 21, 1998, hereby submit their comments in the above-captioned proceeding.

EXISTING CRITERIA

1. The Five Broadcasters oppose the continuation of the traditional "primary factor" used for choosing among mutually-exclusive noncommercial educational ("NCE") applicants for broadcast facilities. That factor, "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants" was previously applied by administrative law judges through the comparative hearing process. The problem with this factor is that: a) it is unclear; and b) can only be applied through an adjudicative process.

2. The difficulty of understanding the traditional comparative standard is apparent from its very terms, and, as noted in paragraph 5 of the NPRM, the Commission's own

Review Board has argued that it is equally difficult to administer. See, Real Life Educational Foundation of Baton Rouge, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). Even if the existing standard did not have the shortcomings just described, it can only be applied through an adjudicative process. This process has historically proven to be very expensive and time-consuming. The two alternatives set forth in the NPRM, a lottery or a "point" system, are significantly more straightforward. Both of these alternatives would also make adjudicative hearings unnecessary. For these reasons, the Five Broadcasters support the tentative conclusion set forth at paragraph 9 of the NPRM to reject traditional hearings.

LOTTERIES

3. The Five Broadcasters oppose the selection from among competing NCE applications by means of a lottery. It is true that, compared to the alternative of a point system, lotteries would likely be easier to employ. But the other disadvantages of lotteries, especially in the noncommercial context, make them an unsuitable alternative.

4. Lottery applications are less rigorously scrutinized and less often challenged by other applicants and the Commission than is the case with the traditional adjudicative process or would likely be true in the "semi-adjudicative" process promised by the point system. This reduced level of review, coupled with the very low expense of filing lottery applications (due, in part, to the fact that no fees are assessed for NCE applications), makes the filing of applications for nearly every available frequency an attractive, and even sensible, alternative for many parties who otherwise might be more judicious about deciding which frequencies on which to file applications. Because lotteries encourage as many applications as possible

(to increase the chances of success on a statistical basis), any party remotely interested in a given frequency will have an incentive to enter the lottery for that frequency. A lottery system will encourage a large number of speculative applications from parties who are the least qualified, and who may have little or no sincere interest in providing a noncommercial educational program.

5. Another significant drawback to lotteries is that they are not designed to select the best possible applicant. Even if lotteries are weighted to promote certain agreed-upon qualifications, there is only a chance, and not a strong likelihood, that the applicant who most closely meets these qualifications will win. Even if applications are "weighted" to increase their statistical chances of success, the success in any given lottery remains a matter of chance. Because victory is determined by means of chance, and only partially by qualifications, the least qualified applicant will quite often win.

6. If the Commission determines through this rule making process that certain criteria make some applicants better than others, then the rules should not be written in such a way that those criteria will be rendered nugatory by the "luck of the draw." The virtue of a point system is that, where any particular frequency is at issue, the applicant who meets the greatest number of selection criteria will garner the most points and reliably tend to obtain the construction permit for that frequency. However, if the selection process becomes a lottery, those criteria will have merely an influence -- but no dispositive effect -- upon the selection of a winner in any given comparative situation.

7. It is clear that some selection criteria will have to be employed to choose among competing applications. The Communications Act[1] requires that at least two criteria be used in the lottery context, and the point system, by its very nature, implies that some criteria must be used in order to award points. So if selection criteria are going to be used, they should control the outcome of any given selection. If they do not, then they become arbitrary and capricious in their application. As explained above, a lottery system — even if it produces certain results over time as statistical averages emerge — does little to insure that the applicant who meets the selection criteria will win in any given instance. Therefore, if the selection criteria are to have meaning, they must be employed in the context of a point system.

8. There are still other reasons to choose a point system over a lottery as the means of choosing from among competing NCE applicants. One compelling reason was created by Congress in § 309(i)(3) of the Communications Act, when it required that any lottery system include the award of preferences to members of designated minority groups. Congress did not mandate that this or any other specific criterion be used in the case of a point system. Minority preferences present a number of very serious problems, and the Commission should use a point system in order to avoid them.

9. As acknowledged in the NPRM (at ¶ 12), racial preferences are subject to strict scrutiny and will be extremely difficult, if not impossible, to justify on Constitutional

[1] 47 U.S.C. § 309(i)(3)

grounds. In order to pass "strict scrutiny," such preferences must be "narrowly tailored" to further compelling governmental interests." Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995). The NPRM does not set forth what government interest might be advanced by these preferences. However, they are presumably little different than those underlying the minority preferences previously used in commercial comparative broadcast proceedings, and which were at issue in Metro Broadcasting, 497 U.S. 547 (1990). Of course, as the Commission is well aware, in Adarand, the Supreme Court explicitly overruled the earlier Metro decision to the extent that it gave "intermediate" scrutiny to the preferences (meaning that they needed to be only "substantially related" to "important" government objectives), and found instead that a strict level of scrutiny should apply to these preferences. Adarand, supra, 515 U.S., at 227; Metro, supra, 497 U.S., at 565. In view of the Supreme Court's conclusion in Adarand, and aside from the unlikely possibility that it would reverse itself on the same subject a second time within ten years, there is no reason to believe the conceptually indistinguishable preference found in Section 309(i)(3) of the Communications Act could possibly be upheld.

10. If one were needed, a final reason to avoid lotteries is the delay that will be associated with their implementation. Because the racial preferences that must be part of any lottery process are unconstitutional, a great deal of appellate litigation will ensue if the lottery process is approved in this proceeding. Yet another source of delay associated with lotteries is that associated with the ongoing "studies" referred to in paragraph 12 of the NPRM.

11. For the above-stated reasons, the Five Broadcasters request that the Commission select some type of point system, rather than a lottery, as the mechanism for choosing among competing NCE applicants. However, if a lottery turns out to be the means selected for this purpose, then the Five Broadcasters would request that applicants receive preferences in accordance with the following list:

12. "Pioneer" Preference. The Commission indicated its disinclination to award preferences on this ground at paragraph 25 of the NPRM. This issue will be discussed further below in the context of a point system, but the Five Broadcasters believe that a substantial preference, at least 2:1, should be awarded to the entity who does the work necessary to find a frequency and file a lead application. The Five Broadcasters believe that the Commission's Concerns about a "land rush" of applications are unfounded (see ¶ 19, infra).

13. Diversification of Ownership. Congress has required that any lottery process must include a preference for applicants with fewer media outlets. However, it did not mandate any particular level of preference. The Five Broadcasters believe that if a preference is given for reduced media ownership, more categories of preference should be created than the plan stated in the NPRM (at ¶ 13) to give 2:1 preference for those who own no media of mass communications and a 1.5:1 preference for those who own three or fewer media outlets. As the Commission is well aware, a handful of noncommercial broadcasters have been filing applications within the past few years at a very high rate, and now own a disproportionate number of noncommercial stations and construction permits. In view of the

number of entities in the United States that own scores of NCE broadcast stations, another line should be drawn to distinguish these large group owners from much smaller regional broadcasters and to give this latter group an appropriate advantage over the large groups in the auction context. The Five Broadcasters propose that a second line of demarcation be drawn at ownership of twenty (20) or fewer mass media outlets. Accordingly, the Five Broadcasters propose that applicants with no other media ownership would receive a 2:1 preference, those with three or fewer would receive a 1.75: 1 preference and those with twenty or fewer would receive a 1.5: 1 preference. Neither the 1.75:1 or 1.5:1 preferences should be available to any entity that owns a station serving the community of the proposed station.[2]

Organizational Control for Purposes of Awarding Preferences

14. The Five Broadcasters agree that board membership might be manipulated in order to obtain preferences and know of no way to prevent such abuses in a lottery context (where there is reduced scrutiny of the bona fides of individual applications) by anyone determined to gain an advantage by such means. This presents another reason to avoid lotteries.

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[2] As explained in ¶ 30, below, the Five Broadcasters object on First Amendment grounds to any policy that is designed to promote one type of programming over any other. However, to the extent that the Commission intends to extend special protection to state-wide educational networks (as indicated in ¶ 14 of the NPRM), the preference for 20 or fewer stations should be helpful to such networks.

Translators

15. The Five Broadcasters feel that translators used to "fill-in" or enhance coverage on the margins of a NCE station's coverage area should be granted a preference over imported distant signals. In many instances, this would give local broadcasters a deserved advantage over entities who seek to cover the nation with mass "satellator" filings. Perhaps a "three-track" system could be used. If fill-in applications were received, they would receive first preference, and no other applications would be included in a lottery with them. Applications for translators within the 40dbu signal of the main station would receive second preference, and similar exclusive lottery treatment, if no fill in applications were received. The third category would be made up of applications that met neither of these first two special categories.

Abuse or Speculation Resulting from Lotteries

16. For the reasons already set forth above, the Five Broadcasters believe that lotteries, by their very nature, encourage mass application filings. Although noncommercial frequencies are not as valuable as commercial spectrum, the potential for limited gain through speculation exists even in the noncommercial realm. There is also a likelihood that large group operators of noncommercial stations will engage in mass filings, consistent with a strategy that many have already demonstrated.

17. Pursuant to paragraph 18 of the NPRM, the Five Broadcasters suggest the following measures to retard speculative applications.

a) Allow any one entity (including groups that area affiliated with or which share common ownership with such an entity) to file applications for a limited number of the allocations that are announced for any single filing window (25%) or a total of three frequencies in any filing window, whichever is less.

b) Prohibit the assignment of construction permits (unbuilt stations become subject to new lottery for which the past permittee is ineligible).

c) Impose holding periods of three to five years and strictly enforce station construction periods.

d) Require applicants to prove in their applications that they have financial ability to build and operate their stations. Many large group and speculative applicants do not have the money to build the number of stations that they have applied for or to construct pursuant to the permits they have previously obtained. They are encouraged in this practice by the current lack of scrutiny given to their financial qualifications.

e) Seek authority from Congress, if necessary, to impose application fees upon noncommercial broadcasters.

f) The best way to avoid speculation or undue concentration of control of the noncommercial spectrum is to reject the use of lotteries altogether.

POINT SYSTEM

Finder's Preference

18. As stated above in connection with lotteries, the Five Broadcasters believe that parties should be rewarded for the initiative, effort and expense required to find an available noncommercial frequency and to file an initial application for it. It is simply not fair for one party to make this effort, and have its fruits so easily snatched away by another party who simply reviews the "cut-off" lists for the next best place to file an application. A "finder's preference should be two (2) points.

19. The concern voiced at paragraph 25 of the NPRM about a "land rush" of applications is unfounded. NCE entities operate on thin budgets and cannot afford to build stations that will not support themselves. So long as the Commission installs safeguards to prevent speculative filings, there will be a strong disincentive to file an application to "reserve" a frequency unless the applicant is certain that it wishes to construct the station in question. Many of these safeguards are the same ones proposed above to halt speculation in the lottery context, and they would work equally well for this purpose. The safeguards include items b, c, d and e, which were listed in paragraph 17, above (impose filing fees, require proof of financial qualifications, prohibit the sale of construction permits so the costs of filing speculative applications cannot be recouped and require licensees to operate their stations for from 3 to 5 years before they may be sold or transferred).

Local and Nationwide Diversity

20. The Five Broadcasters support the local diversity preference suggested in paragraph 21 of the NPRM, but only if that local diversity preference is accompanied by the "broader" diversity preference discussed above (at ¶ 13). The public in any given community should be served by different NCE licensees, and the local diversity preference helps to further this worthwhile goal. But this objective will have little meaning for the nation as a whole if just a few large station groups operate in every community. Otherwise, a large group owner with 100 stations would be on the same footing with a local or regional group with none or only ten stations. Accordingly, it is suggested that credit should be awarded for local diversity (2 points), but also an equal credit (2 points) to entities that own three or fewer mass media outlets. One (1) point should be awarded for entities that own twenty or fewer mass media outlets and no points would go to those with more than twenty outlets.

Safeguards to Prevent Manipulation of Governing Boards.

21. In response to the question posed in the last sentence of paragraph 21(A) of the NPRM, the Five Broadcasters agree that the control of a noncommercial entity is not necessarily explained by the makeup of its governing board. As elsewhere in life, power is exercised by control over an NCE entity's finances. It is suggested here that a certification be included in every application that funding for the construction and operation of the proposed station was being provided by each applicant, or that the receipt of funding from any other organization will be fully disclosed, both as to the identity of the owner and the

amount. If such funding indicated that control was being exercised by another entity, then the preference would be withheld. Misrepresentation or concealment in this regard could result in the loss of a station license. The threat of such sanctions would, it is hoped, prevent the abuses that the Commission justifiably fears, while still permitting normal, good faith, changes in the members of the volunteers who usually make up the boards of non-profit entities.

Fair Distribution of Service

22. The Five Broadcasters are aware that the three factors listed in paragraph 21(B) have long been used by the Commission to enforce the mandate of Section 307(b) of the Communications Act. However, it is respectfully submitted that these factors badly need to be revised.

23. The principal flaw of the standards proposed in paragraph 21(B) is that they focus upon "communities," not people. National Association of Broadcasters v. FCC, 740 F. 2d 1190 (D.C. Cir. 1984). If they are incorporated into any new point system, a great deal will come to depend upon the fairly trivial distinctions that decide what population groups constitute "communities" under Section 307(b). If this question is not subject to litigation, the process will be perceived as a most unfair one, as questionable claims about community status go unverified. Yet, if litigation becomes common, the benefits of the supposedly non-adjudicative "point" system will be lost.

24. The proper focus for distribution of service is upon people, not (often fictional) communities. Such a focus would not only be fairer, but it could be applied through

mathematical formulae that would count population coverage in an objective manner and would not prompt litigation. Section 73.525(e)(2)(ii) of the Commission's rules assumes equal distribution of population in county subdivisions. Using this assumption, software programs could reliably count the number of persons in a coverage area that receive no noncommercial broadcast service, those who receive only one, and so forth. Two (2) points could be awarded for first service to a population beyond a minimum threshold (perhaps expressed as a percentage of the total population served) and one (1) point for second service beyond a similar set level. Under certain circumstances, the number of points awarded for second service could equal those awarded for first service, if a high-enough ratio of second to first service were achieved (four to one or five to one, perhaps).

25. The proposal set forth above would be objective and not subject to dispute, if a single, consistent software program were relied upon to perform the calculations. The Five Broadcasters submit that some variation of the foregoing approach would be a vast improvement over the system proposed in paragraph 21(B) of the NPRM.

Technical Perameters (Area and Population).

26. The Five Broadcasters agree with the premise that applicants which offer noticeably better technical proposals should receive one or more points, per paragraph 21(C), note 24. and paragraph 22. To obtain a point for technical superiority, an applicant should cover at least 10% greater area and a 10% larger population. The only problem that is presented here is that the proposal to give a similar level of points for Section 307(b) white and gray area coverage, on the one hand, and service to larger areas and populations, on the

other, might tend to neutralize the § 307(b) factors, which have historically been deemed more important.

Additional Bases for the Award of Points

27. (1) Comment has already been made above on the inadvisability of minority control credits. The Five Broadcasters do not believe that they can be given in a manner that is either fair or constitutional.

28. (2) Local Educational Presence. This factor is too subjective to handle outside of an adjudicative context. In addition to the issue of how long the organization should have been in existence, too many other questions suggest themselves. It would not be fair or consistent with Section 73.503 of the Commission's rules to limit the credit only to accredited universities or colleges. But if some test were not used, how could the legitimacy of such organizations be tested? Furthermore, what proof exists that "established" educational organizations provide better noncommercial educational service than new organizations? How can the problem of promise versus performance be avoided? Any organization could make a case for implementing educational goals, and then fail to follow the plan it used in order to gain the credit. Will licenses be revoked for such failures?

29. This proposal to give extra credit to local educational organizations in connection with certain educational goals proceeds from untested assumptions, requires too many subjective judgements and cannot be fairly applied. Therefore, it should not have a place in any point system adopted in this proceeding.

30. (3) State or Municipal Education Plans. The NPRM has made it clear that the Commission approves of state or municipal education plans. However, this amounts to a presumptive choice of one choice of program content over all others. Licensees have long been granted the discretion to choose the content of their programming, so long as they meet their public interest obligations in some fashion. However, the manner in which they meet this obligation (the issues they believe to be of importance to their listeners and how they address those issues) continues to be left up to each licensee. See, e.g., Time-Life Broadcast, Inc., 33 FCC 2d 1081, 1092 (1972). This proposed credit is, inescapably, a governmental choice of one sort of program content over another. Accordingly, it would not be appropriate to award additional credit on this proposed ground.

Tie-Breakers

31. The Five Broadcasters oppose share time arrangements because they are indeed very confusing for audiences and make it difficult for either of the parties to the time-share to develop a listenership. The problem is exacerbated when the programming offered by the parties to the share time is especially incompatible. It appears from paragraph 29 of the NPRM that the defects of share time arrangements might be used to induce settlements. But surely it is unwise to codify a bad policy, even if it may sometimes promote another policy that may itself be more defensible. If the goal is to bring about more settlements, then a more benign means for doing so must be found.

Tie breaker lottery

32. Lotteries are less objectionable as a last-resort tie-breaking device than as a primary means of choosing among applicants. If they would only come into play as tie-breakers, they would not induce mass filings. Further, the existence of a tie means that there was no clear winner under the chosen selection criteria, and a lottery at this stage could not be said to negate the criteria. It is surely better to have a lottery than have the award of a permit decided by some truly obscure and picayune preference that would not advance the public interest in a meaningful fashion.

HOLDING PERIOD

33. The Five Broadcasters agree that a five-year on-air holding period is appropriate for applicants who have obtained NCE construction permits through lotteries or point comparisons with competing applicants. Those who sell prior to five years should be limited to reasonable and prudent expenses incurred in connection with the application for and construction of the station. If operating expenses not offset by income are to be reimbursable, a reliable system of verifying the accounting of these expenses and claimed losses must be implemented. No payment should be allowed for construction permits. If stations are not built within the time allotted, the permit should go to the next applicant in the queue.

34. The Five Broadcasters oppose the proposal to require certifications that NCE licensees remain eligible for preferences or points they have received. The NPRM did not indicate what sanction might be imposed upon an entity that failed to remain eligible.

However, in the absence of safeguards during the application process and sanctions for the violation of "certifications" the process might create the appearance of oversight and accountability where none truly exists. The Five Broadcasters believe that more effort should be made to insure that only bona fide applicants receive permits in the first instance.

NCE STATIONS ON COMMERCIAL CHANNELS

35. The Five Broadcasters believe that NCE stations will not be permitted to participate in auctions for the reasons set forth by Commissioners Furchtgott-Roth and Tristani in the NPRM. Moreover, most NCE stations could not justify or fund the bids that would be necessary to compete with commercial applicants, even if NCE 's were allowed to participate in auctions.

36. The Five Broadcasters submit that NCE's should not be foreclosed from operating on commercial channels, and support the proposal made in paragraph 37 of the NPRM to expand the availability of reallotments where necessary to provide a first or second NCE aural service. Consistent with its arguments made earlier about the pitfalls of tying rules to the presence of absence of a "community," the Commission should establish some appropriate percentage (perhaps 50%) of an applicants proposed coverage area which is receiving a first or second service.

37. Another solution would combine contour protection and slightly reduced power for NCE stations. In many current instances in which no commercial channel can be fit into an existing area pursuant to the mileage separation rules applicable to commercial stations, a noncommercial station could be made to work by taking advantage of contour protection

and 3kw (instead of 6kw) maximum power. This would increase the NCE spectrum without harm to commercial stations.

Respectfully submitted,

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